



August 15, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-4508

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167103.

The Texas Department of Transportation (the "department") received a request for

1. All correspondence and documents of any kind relating to any aspect of SH 45 South, or any part of SH 45 South, where such document or correspondence was received or generated from December 21, 2001, the date of receipt of Save Our Springs' previous request, until the date this request is received. Reference to SH 45 includes any portions of this existing or contemplated project from Loop 1/Mopac to IH 35 and on to 183/SH 130 East of I-35.
2. All contracts for any environmental, engineering or other work related in any way to SH 45 South or any part of SH 45 South received or generated since December 21, 2001 and any such documents from before this date but after January 1, 1999 for SH 45 South between Loop 1/Mopac and RM 1626.
3. All correspondence to or from any representative or member of the Capital Area Metropolitan Planning Organization and to or from any member of the Texas Transportation Commission, Mr. Phillip Russell, Mr. Michael Behrens or any person acting as representative of or under the supervision of any of these persons, including such correspondence sent or received in private offices, on private or business e-mail accounts, or at home or home e-mail accounts, from December 21, 2001 to the date this request is received.

4. All financial disclosure statements on file for each of the three Texas Transportation Commission members.

You state that the department will release some of the requested information to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. Further, you provide documentation showing that you have notified the Texas Transportation Institute of the Texas A&M University System ("TTI"), a third party whose proprietary interests may have been implicated by the request, of the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions you raise and reviewed the submitted information.

You contend that the information in Exhibit B is subject to the attorney-client privilege and is therefore excepted under sections 552.101, 552.107, and 552.111 of the Government Code.¹ Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. See Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Upon review of the submitted documents, we conclude that most of the information in Exhibit B comes within the attorney-client privilege and is therefore excepted from disclosure under section 552.107(1). We note, however, that one of the e-mail messages in Exhibit B does not contain an attorney's legal advice or a client's confidences. Thus, this e-mail message may not be withheld under section 552.107.

You also claim that the information in Exhibit B constitutes intra-agency communications and is therefore excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal

¹We note that in Open Records Decision No. 574 (1990), this office determined that the statutory predecessor to section 552.107(1) was the appropriate section for a governmental body to cite when seeking to except from required public disclosure communications between the governmental body and its legal counsel.

communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. The remaining e-mail message in Exhibit B, however, contains only facts relating to administrative matters; section 552.111 does not except such information from required public disclosure.

Next, you claim that the e-mail addresses that you have marked in Exhibit C are excepted under section 552.137 of the Government Code. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This exception makes certain e-mail addresses confidential.² Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You state that the members of the public whose e-mail addresses appear in the requested information have not affirmatively consented to the release of these e-mail addresses. The department must, therefore, withhold e-mail addresses of these members of the public under section 552.137. We agree that most of the e-mail addresses you have marked are the type that must be withheld under section 552.137 of the Government Code. Further, we have marked an e-mail address in Exhibit B and a representative sample of additional e-mail addresses in Exhibit C that must be withheld under 552.137. We note, however, that section 552.137 does not apply to a government employee's work e-mail address. Therefore, we have also marked a representative sample of e-mail addresses that you have marked in Exhibit C that may not be withheld under section 552.137.

Finally, the department takes no position as to whether any of the information in Exhibit D is excepted from public disclosure. You claim, however, that TTI may have a proprietary interest in that information. An interested third party is allowed ten business days after the

²House Bill 2589 also makes certain e-mail addresses confidential. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, TTI has not submitted to this office any reasons explaining why the information in Exhibit D should not be released. Therefore, we have no basis to conclude that the information in Exhibit D is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, Exhibit D must be released.

To summarize, we conclude that: (1) with the exception of the e-mail message we have marked for release, the department may withhold the information in Exhibit B under section 552.107(1); (2) we agree that most of the e-mail addresses you have marked in Exhibit C must be withheld under section 552.137; (3) we have marked an e-mail address in Exhibit B and a representative sample of additional e-mail addresses in Exhibit C that must be withheld under section 552.137; (4) we have marked a representative sample of e-mail addresses that you have marked in Exhibit C that are not subject to section 552.137 and must be released; and (5) the department must release Exhibit D.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 167103

Enc: Submitted documents

c: Mr. Bill Bunch
Save Our Springs Alliance
P.O. Box 684881
Austin, Texas 78768
(w/o enclosures)